

October 1, 2013

Thomas V. Pellegrino  
Superintendent  
Alpine Union School District  
1323 Administration Way  
Alpine, CA 91901

Re: Your Request for Advice  
**Our File No. I-13-118**

Dear Mr. Pellegrino:

This letter responds to your request for advice regarding duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

Please note that the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of interest laws, such as Government Code Section 1090 or common law conflict-of-interest. Also, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

### QUESTION

1. May the Alpine Union School District (the “District”) enter into a contract with Supplemental Online Services, Inc. (“SOS”), despite a District employee’s ownership of the private corporation?
2. Is there a conflict of interest in your recommending a business relationship with SOS to the governing board of the District?
3. Is there a conflict of interest in the governing board’s decision to engage in a business relationship with SOS?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

4. Is there a conflict of interest in Mr. Cochrane's discussions or decisions regarding the District's business relationship with SOS?

### **CONCLUSION**

1. Yes. Under the Act, the District is not prohibited from doing business with companies owned by employees so long as the employee does not have a conflict of interest under the Act.
2. No. Since you have no economic interests in SOS, you will not have a conflict of interest.
3. No. Since the Board Members have no economic interests in SOS, they will not have a conflict of interest in the decision.
4. Yes, unless the governmental decision does not have a reasonably foreseeable material financial effect on Mr. Cochrane's economic interests.

### **FACTS**

Mr. Cochrane is the District Director of Human Resources and Pupil Services at Alpine Union School District. His responsibilities involve staffing decisions, special education services and implementation, and the implementation of state and federal funding projects. These responsibilities do not include the implementation of student disciplinary programs, except insofar as such programs are statistically more likely to affect special education students and so may become the subject of some future District-wide special education program analysis. Mr. Cochrane does not have any official control over the implementation of student disciplinary programs.

Prior to joining the District, Mr. Cochrane owned a private company, SOS, that provides online learning modules to facilitate school district compliance with Assembly Bill 1729. AB 1729 requires school districts to provide students with additional forms of corrective action prior to suspension or expulsion with regard to certain Education Code section 48900 offenses. SOS offers tailored modules geared to specific types of common student misbehaviors. Mr. Cochrane has offered to donate the SOS programs to the District free of charge. You believe that these programs are superior to other available resources for providing corrective actions to District students after researching the best practices with other superintendents. The service is free of charge, which is also attractive for the district.

Mr. Cochrane and his spouse are the sole shareholders of the corporation. SOS employs five at-will consultants, who service the U-Turn programs. Mr. Cochrane is not required to spend his time servicing the programs, which he developed during his private time using non-District resources.

According to Mr. Cochrane, the "pilot" school district for SOS's program is Mountain Empire School District; Mountain Empire does not pay SOS, and instead provides statistical data and feedback in exchange for use of the service.

SOS does not seek to enter in a “pilot” relationship with the District. SOS’s offer of services to the District is a straight donation. The District presently provides students a general, motivation based packet of worksheets as their form of AB 1729 corrective action. You believe use of the SOS U-Turn programs would provide the District a more legally defensible form of corrective action in student discipline cases. Mr. Cochrane wishes to donate use of the program to the District because he believes the District needs a better way to comply with AB 1729, and because he does not feel that - as a District employee - he may charge the District for the use of SOS’s services. He will not be involved with either presenting or voting on any proposal to the governing board. You will present a proposal, and the board will vote.

### **ANALYSIS**

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision:

#### **Step One: Is the individual a “public official?”**

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048.)

As a District Director of Human Resources and Pupil Services, Mr. Cochrane is a public official within the meaning of the Act. As school board members, each member of the District’s governing board is a public official within the meaning of the Act. As the Superintendent of Alpine Union School District, you are a public official within the meaning of the Act.

#### **Step Two: Is the official making, participating in making, or influencing a governmental decision?**

##### You and the Board:

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

Members of the District's governing board and you are making, participating in making, or influencing a governmental decision when taking part in decisions related to the adoption of SOS programs.

Mr. Cochrane:

Though he will not be involved in the presentation or voting, Mr. Cochrane may be making, participating in making, or influencing a governmental decision when contacting you or board members prior to a proposal to the board. A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee or consultant of his or her agency. (Regulation 18702.3.) This includes appearances or contacts by the official on behalf of a business entity, client, or customer. (Regulation 18702.3(a).)<sup>2</sup>

It appears that decisions regarding a business relationship between SOS and the District will come before the District's governing board based on your recommendation. As an employee of the District, Mr. Cochrane may not contact you, any governing board members, or any other district employees regarding the adoption of SOS programs. If he does, he is making, participating in making, or using his position to influence any decision involving an SOS business relationship that will come before the District. This rule does not preclude an agent of SOS, other than Mr. Cochrane, from contacting District employees or board members.

**Step Three: What are the official's interests that may be affected by the decision?**

Of the interests recognized under Section 87103 of the Act<sup>3</sup>, those interests that may be implicated by your account of the facts are the following:

*Business Entity* – A public official has an interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulation 18703.1(a) and (b).)

*Source of Income* – A public official has an interest in any source of income, including promised income, which aggregates to \$500 or more within the 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

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<sup>2</sup> A different rule may apply where the decision is made by a separate agency from the agency whose staff is making the recommendation or proposal. (Regulation 18702.3(b).) A common example of this is a Planning Commission's recommendation to a City Counsel. Under this rule, when contacting any employees of the separate agency, the official cannot act or purport to act on behalf of, or as a representative of, their agency to any member, officer, employee, or consultant of any agency to influence a decision that will have a material financial effect on their interest. (Ibid.) A common example of this is using official stationery to contact employees of the decision making agency. The facts provided indicate that Mr. Cochrane is within the same agency as both you and the board.

<sup>3</sup> Our analysis is limited to the interests you have identified.

*Personal Finances* – A public official has an interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Mr. Cochrane:

If Mr. Cochrane or his wife currently have an ownership interest of at least 10% in SOS, and that ownership interest is worth \$2,000 or more, then they have an interest in the business entity under Section 87103(d). It also appears that Mr. Cochrane may have received income from SOS of \$500 or more in the 12 months prior to any decisions by the Alpine Union School District regarding contracts with SOS. If so, Mr. Cochrane also has an interest in SOS as a source of income. (Section 87103(c).)

Mr. Cochrane also has an interest in clients of who provide, based on Mr. Cochrane’s proportionate share of the income from SOS, \$500 or more in income to him during the 12-month period prior to his participation in District decisions affecting SOS. However, you have not provided sufficient facts for us to analyze these potential sources for conflicts of interest.

A public official always has an interest in his or her personal finances. A governmental decision will have an effect on this interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) However, a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest is not considered a separate financial effect on an official’s personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to your circumstances and we will not discuss it further.

No payment or other consideration will be made by the District for the use of SOS programs. This does not remove the existence of Mr. Cochrane’s economic interests, which will remain in existence for all decisions affecting a relationship between SOS and the District.

School Board:

You present no facts indicating that any members of the District’s governing board have financial interests in decisions regarding contracts with SOS.

Mr. Pellegrino:

You present no facts indicating that you have financial interests in decisions regarding contracts with SOS.

In light of the conclusion that neither the Board nor you have any direct or indirect economic interest represented, there are no prohibitions from those parties taking part in decisions regarding the District's relationship with SOS. It is therefore unnecessary for us to consider those parties' additional conflict of interest rules at this time. We will continue the analysis of Mr. Cochrane's interests.

**Step Four: Are the official's interests directly or indirectly involved in the decision?**

Mr. Cochrane:

Regulation 18704.1(a) states that a business entity or source of income is directly involved in a decision before the official's agency when that business entity or source of income, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Additionally, an official's interest in his or her personal finances is deemed to be directly involved in the governmental decision if facts suggest any financial effect on his or her personal finances or those of his or her immediate family. (Regulation 18704.5.) The regulation contains no provision for indirect interests.

Mr. Cochrane's business interest is directly involved in any District proceedings regarding SOS.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's interests?**

**Materiality**

The financial effect of a governmental decision on a business entity or source of income interest which is directly involved in the governmental decision is presumed to be material. (Regulation 18705.1.) That presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity. Any financial effect is dispositive, even “one-penny.”

**Foreseeability**

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. For a material financial effect to be foreseeable on an official’s interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

However, the facts suggest that decisions involving a donation of SOS programs to the district without any consideration would not financially affect Mr. Cochrane’s business. Please note that if Mr. Cochrane determines that there is a reasonably foreseeable material effect on his business, he would have a conflict of interest.

**Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?****Public Generally**

The material financial effect of a governmental decision on a public official’s economic interest in a business entity is indistinguishable from its effect on the public generally if that decision also affects twenty-five percent or more of all business entities in the jurisdiction of the official’s agency, or 2,000 business entities in the jurisdiction of the official’s agency. (Regulation 18707.1(a); Regulation 18707.1(b)(1)(C).)

You present no facts indicating that the public generally exception applies.

**Legally Required Participation**

There are a limited number of circumstances that allow a public official to take part in a governmental decision despite a disqualifying conflict of interest under the legally required participation exception. This exception applies very rarely, and only where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

You present no facts indicating that the legally required participation exception applies.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Nicholas Sanders  
Legal Intern, Legal Division

NLS:jgl